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Statement of David E. Aaronson in Support of HB 1075 to Repeal the Death Penalty

David E. Aaronson
American University Washington College of Law, daarons@wcl.american.edu

Statement of David E Aaronson in Support of HB 1075 to Repeal the Death Penalty for Submission to the Judiciary Committee, House of Delegates, Maryland General Assembly, Hearing, March 15, 2011

Chairman Joseph F. Vallario, Jr. and Members of the Committee:

I. Introduction

I appreciate the opportunity to provide this Statement in support of HB 1075 to repeal the Maryland death penalty.

I have been a full-time law professor at the Washington College of Law, American University, since 1970 and serve as Director of the law school's Trial Advocacy Program. My areas of specialization include criminal law and procedure, evidence, and trial advocacy. I have been a member of the Maryland Bar since 1975. Currently, I am an *ex officio* member of the Maryland State Bar Association's Section of Criminal Law and Practice, serving as chair in 1989-1990. Also, I am an active member of the American Bar Association, Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices, serving as chair in 2008. I am an elected member of the American Law Institute.

I published Maryland's first book of criminal pattern jury instructions in 1975, followed by a second edition in 1988 and a third edition in 2009. See David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary* (LexisNexis: 3rd ed., 2009). One of the instructions and commentary in *Maryland Criminal Jury Instructions and Commentary*, Instruction §5.51(c), First Degree Murder: Death Penalty Sentencing, focuses on Maryland's death penalty statute.

My Statement below is based, in part, on my research and writing of the recently published *2010 Supplement* to the Third Edition, Volume One, pages 71-74. While preparing the section on the new evidentiary requirements of Crim. Law § 2-202, I concluded that without guidance from the Maryland Court of Appeals on definitional issues, I should not offer suggested jury instructions.

The issue before you at this legislative session is whether repealing the state's death penalty would improve the quality of the administration of justice in Maryland. There are additional reasons to repeal the Maryland death penalty statute this year.

II. The 2009 Amendment to the Maryland Death Penalty Statute

Effective October 1, 2009, the Maryland General Assembly enacted Senate Bill 279, amending the evidentiary requirements of Crim. Law § 2-202 to restrict application of the death penalty to cases in which the State presents the court or the jury with (1) biological evidence or DNA evidence that links the defendant with the act of murder; (2) a videotaped, voluntary interrogation and confession of the defendant to the murder; or (3) a video recording that conclusively links the defendant to the murder. Crim. Law § 2-202 (a)(3). As is well known, Senate Bill 279 initially was an effort to repeal the death penalty in its entirety. With several floor amendments, the Bill evolved into a limitation on the imposition of the death penalty rather than outright repeal.

The changes that were ultimately made to Crim. Law § 2-202 are a response to concerns about the reliability of evidence used to obtain convictions in cases in which the death penalty might be imposed. Its remedial purpose is to limit application of the death penalty to cases in which evidence of guilt is most reliable. *See* Memorandum Opinion of Judge Paul Hackner, Circuit Court for Anne Arundel County, *State of Maryland v. Lee Edward Stephens*, Case No. K-08-646 (Md. Cir. Ct. Dec. 10, 2009) (order denying motion to preclude the death penalty on constitutional grounds), p. 2. *See also*, 2009 Md. Reg. Sess. S.Deb on S.B. 279, available at http://mlis.state.md.us/asp/listen.asp. Press reports at that time stated that the new statute was conceived in some haste by legislators seeking an alternative to complete abolition. The statutory amendment uses definitional terms not found in death penalty sentencing statutes in other states.

III. Enacting HB 1075 in this Session of the Maryland General Assembly will avoid the Cost of Scarce Judicial Resources, Time-consuming and Expensive Litigation, and an Increased Risk that a Death Penalty Sentence will be Overturned on Appeal

The focus of my Statement is on the likely costs in terms of scarce judicial resources of implementing the October 1, 2009, amendment to Crim. Law § 2-202.

Those both for and against the death penalty may agree that the 2009 Amendment presents definitional issues that no doubt will have to be clarified by the Maryland Court of Appeals. In addition to issues of statutory interpretation, the Maryland Court of Appeals will need to address issues of the constitutionality of the revised statute, including whether the statute is unconstitutionally vague under the Fourteenth Amendment's guarantee of procedural Due Process. This issue was raised in the case of *State of Maryland v. Lee Edward Stephens*, mentioned above. The resulting litigation is likely to consume considerable judicial resources and increase the likelihood that a death penalty sentence will be overturned on appeal.

Amended Md. Code Ann., Crim. Law § 2-202 provides:

(a) *Requirement for Imposition*. - A defendant found guilty of murder in the first degree may be sentenced to death only if:

. . .

(3) the State presents the court or jury with:

(i) biological evidence or DNA evidence that links the defendant to the act of murder;

(ii) a video taped, voluntary interrogation and confession of the defendant to the murder; or

(iii) a video recording that conclusively links the defendant to the murder.

The amendment also added the following language:

(c) *Limitations – State relies solely on eyewitness evidence.* - A defendant may not be sentenced to death … if the State relies solely on evidence provided by eyewitnesses.

To reflect the 2009 statutory changes, the Maryland Court of Appeals amended Md. Rule 4-343, which provides for a bifurcated procedure in capital punishment sentencing. In the amended Rule 4-343, the new evidentiary requirements are considered in the first phase of the sentencing process, requiring the jury to find beyond a reasonable doubt that the State has produced the requisite evidence that links the defendant to the act of murder. If the jury unanimously determines that the State has produced one of the required types of evidence, the jury then moves on to the Phase II findings to consider the other elements of death-eligibility that pre-existed the 2009 Amendment.

Definitional issues include, but are not limited to, the following:

A. Biological Evidence

Biological evidence is defined in Md. Code Ann., Crim. Proc. §8-201(a). The provision states that biological evidence includes, but is not limited to, "any blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker groupings may be obtained." §8-201(a). The definition seems to contemplate only the type of evidence from which "genetic marker groupings," for example, DNA, may be obtained. A question may be raised whether, if DNA evidence "may be obtained" from biological evidence, such as a hair, but is in fact not obtained, the biological evidence could then be independently admissible in evidence. It is unclear whether the possibility of obtaining DNA is sufficient, or whether DNA must, in fact, be recoverable from the evidence in question. Fingerprints and human hair, for example, possess characteristics that are useful for accurate identification of a suspect where a fingerprint or hair at the crime scene is compared with that of the suspect. However, while DNA *may* be obtained from human hair, it is not always recoverable from every individual hair, and therefore, it is unclear under these circumstances, whether the hair would qualify as biological evidence. These practical problems may raise a question as to whether a different interpretation of §8-201(a) is appropriate. A different reading of §8-201(a) might find that the part of the definition stating "or other bodily substances from which genetic marker groupings may be

obtained," is simply one example in a non-exclusive list, rather than a requisite characteristic of biological evidence.

B. DNA Evidence

DNA evidence appears frequently in Maryland statutes and is generally defined simply as "deoxyribonucleic acid." *See* Md. Code. Ann., Crim. Proc. §8-201; Md. Code Ann., Pub. Safety §2-501, *et seq.*; *see also* Md. Code Ann., Cts. & Jud. Proc. §10-915 (defining deoxyribonucleic acid (DNA) as "the molecules in all cellular forms that contain genetic information in a chemical structure of each individual."). The term is commonly understood and appears frequently in Maryland case law and statutes without a definition. *See e.g.*, Md. Code Ann., Crim. Proc. §6-232; Md. Rule 4-401(b); Md. Rule 4-702 (cross-referencing the definition of DNA in Md. Code Ann., Crim. Proc. §8-201); *Gregg v. State*, 409 Md. 698 (2009) (discussing DNA evidence without considering whether there could be any uncertainty of its meaning).

C. Links or Conclusively Links

The statute states that biological or DNA evidence must link the defendant to the act of the murder. Crim. Law §2-202(a)(3)(i). On the other hand, the statute provides that a video recording must conclusively link the defendant to the murder. Crim. Law §2-202(a)(3)(iii). The common meaning of "links" is "connects." *See e.g.*, *Gray v. State*, 368 Md. 529, 564 (2002) ("If the trial court finds that such sufficient evidence, linking the accused witness to the crime . . . ."); BLACK'S LAW DICTIONARY (9th ed. 2009). Accordingly, a plain reading of the statute is that the evidence at issue must establish a connection between the defendant and the murder that creates the inference that the defendant committed the crime. Although the plain meaning of "link" is generally understood, there is some ambiguity with its use in the statute. The DNA or biological evidence offered by the state to support the death penalty is not a prerequisite of a valid conviction. Thus, even where the state's DNA evidence is so tenuous or insignificant that it was not relied on to obtain a conviction, the state may, nonetheless, offer it in support of the death penalty so long as it establishes the requisite "link." Where the victim and the defendant were acquaintances, it is likely that the victim's DNA might be found in the defendant's car, for example. This "link" would suggest that the defendant and the victim were in close proximity at one point, but would not have been a sufficiently reliable basis for a conviction. Alternatively, the requirements under the new evidentiary threshold could be viewed as analogous to corroborating evidence which is required to enhance the reliability of the defendant's conviction.

The requirement that the link be conclusive if the state relies on a video recording suggests that the General Assembly intended there to be a difference between the degree of linkage required by subsection (a)(3)(i) and (a)(3)(iii). Because it is unclear what standard should apply, however, the difference is uncertain. For example, "conclusively" might be interpreted to require a link beyond a reasonable doubt, by clear and convincing evidence, preponderance, or a new standard altogether. One plausible explanation for the heightened requirement in (a)(3)(iii) is the uncertainty of identifying an individual on a video recording as opposed to his DNA. Given that the amendments to the death penalty statute were motivated in

part by concerns over the unreliability of eyewitness identification, the General Assembly may have intended the "conclusive link" to allow the state to rely only on video recordings where the defendant can be clearly identified. Under this interpretation the state might be prevented from relying on video recordings where the defendant was wearing a mask or a hat, or was otherwise difficult to identify, or where the video was grainy and difficult to make out.

Is a video showing an accused walking into a store one minute before 911 was called by a person hearing shots a sufficient association to "conclusively link" the defendant to "the murder"? What about two minutes? Three minutes? Five Minutes?

D. Murder or the Act of Murder

Under §2-202(a)(3)(i), DNA or biological evidence must link the defendant to the "act of murder," while subsection (a)(3)(iii) requires that a video recording conclusively link the defendant to "the murder." It is unclear what the General Assembly's intention was in distinguishing between the murder and the "act of murder." It is possible that the General Assembly anticipated a scenario similar to the one discussed above, where the victim and the defendant were acquaintances and, therefore, DNA evidence linking the two is readily available. The requirement that DNA or biological evidence must link the defendant to the "act of murder" may be to distinguish evidence that shows the participation of the defendant in the crime itself rather than merely tending to identify the defendant with the perpetrators of the crime. *See* Memorandum Opinion of Judge Paul Hackner, Circuit Court for Anne Arundel County, *State of Maryland v. Lee Edward Stephens*, Case No. K-08-646 (Md. Cir. Ct. Dec. 10, 2009), p. 18.

E. A Video Taped, Voluntary Interrogation and Confession of the Defendant to the Murder

With regard to a video taped confession, the defendant must confess "to the murder". Does this mean to the act of murder or is it sufficient if the defendant states that he/she was there when it happened? Suppose the defendant gave several statements that were not video taped and that contradicted a video taped statement? Suppose, the video tape is stopped several times during a fifteen minute interview so that the police may talk to the defendant off camera?

IV. Conclusion

This Statement is respectfully submitted in support of the House of Delegates adopting HB1075 to repeal the Maryland Death Penalty at this legislative session, thereby avoiding the use of scarce judicial resources, time-consuming and expensive litigation, and an increased risk that a death penalty sentence will be overturned on appeal. The goal of the 2009 amendment is a worthy one, to reduce the unacceptable risk that an innocent person will be sentenced to death and executed. This goal is best achieved by repealing the Maryland Death Penalty.